No. 91-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES

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PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES

Most of the points made in the Solicitor General's brief are reasons for this Court to grant review. The Solicitor General does not defend the Eleventh Circuit's ruling that association membership requirements are lawful only if the association (1) lacks market power and (2) can run the gauntlet of a five-part test for *per se* tying. To the contrary, the Solicitor General sets forth an entirely different standard (U.S. Br. 7-11), stating, *inter alia*, that "the antitrust laws seldom should prevent a trade association from deciding for itself on the particular package of services and benefits it wishes to extend to members" (*id.* 10), and that "per se tying analysis is rarely applicable to a package of benefits and services offered by a trade association to its members." *Id.* at 15. The Solicitor General is also "troubled" by the Eleventh Circuit's failure "to acknowledge the significance of potential procompetitive justifications" for the membership requirement. *Id.* at 7. And he recognizes that the decision below may "encourage (or prolong) unwarranted antitrust challenges to association membership requirements." *Id.*

Despite these concerns, the Solicitor General recommends against the Court's review because he finds "no square conflict with a decision of this Court or a court of appeals." *Id.* The assertion that there is no conflict, however, is wrong. The decision below conflicts with *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), and *Associated Press* v. *United States*, 326 U.S. 1 (1945), and review should be granted to resolve those conflicts. Moreover, review should be granted because of the national importance of establishing a single, definitive legal standard for trade and professional associations and avoiding the serious repercussions to local Boards of Realtors of allowing the decision below to stand.

1. The government errs in alleging no square conflict. The government claims that "[t]he cases on which petitioners rely do not go so far as to hold that such a [mem-

bership] requirement is per se legal if membership is open to any real estate broker and the dues accurately reflect the costs of the full range of services and benefits provided to members." U.S. Br. 11. But this is precisely what the Fifth Circuit held in *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989).

Like the plaintiffs here, the plaintiffs in *Pope* "were not permitted to participate in the MLS because they were not board members." 872 F.2d at 130. The Fifth Circuit began its analysis by noting that the "exclusion of non-members from the MLS . . . is examined under the rule of reason." *Id.* The court then analyzed *not* whether the local board and MLS had market power (as the Eleventh Circuit did), but whether the board's membership requirements were reasonable, that is, cost-based and non-discriminatory. Contrary to the Solicitor General's argument, the court in *Pope* expressly held that cost-based fees are reasonable:

> *Membership dues reasonably related to expenses and to recouping the costs of the MLS are reasonable.*
>
> . . . .
>
> [Conversely,] [t]o collect *more than the cost* of the service creates a barrier to the admittance of any new member and is without competitive justification.

Id. (emphasis added). The court then affirmed the grant of summary judgment for the board as to reasonableness because in *Pope*, as here, the plaintiffs "do not argue that the board is collecting more total fees than is reasonably necessary to run the operation of the MLS and the other essential operations of the board." *Id.* The court also examined the Popes' claim that the Board's membership fee schedule was discriminatory because it "forced [them] to carry the majority of the board's financial burden." *Id.* The court rejected that claim as well, finding the Board's apportionment scheme to be fair. *Id.* at 130-31.[1]

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[1] The district court's "extensive opinion" (872 F.2d at 129) in *Pope* further confirms that the issues there were identical to those here. *Pope* v. *Mississippi Real Estate Comm'n*, 695 F. Supp. 253 (N.D. Miss. 1988). The district court examined both "whether

The decision below conflicts with *Pope*. Plaintiffs' central claim in both cases—that the anttirust laws prohibit a board from denying non-members access to its MLS—is identical. In *Pope*, the Fifth Circuit affirmed summary judgment because the Board's membership fees were cost-based and therefore reasonable, and because the apportionment of fees among members was nondiscriminatory. In this case, by contrast, the Eleventh Circuit reversed summary judgment. It ignored the question whether the Board's membership requirements were reasonable and non-discriminatory, and held instead that, at least absent unspecified procompetitive justifications, membership requirements violate the Sherman Act if the Board has market power. Pet. App. 28a. These are squarely conflicting holdings that warrant resolution by this Court.

The decision below also conflicts with *Associated Press* v. *United States*, 326 U.S. 1 (1945). The Solicitor General acknowledges that, in *Associated Press*, this Court rejected the government's argument that associations may not limit competitively valuable services to members. U.S. Br. 12. But he argues that this Court's willingness to let the government reopen proceedings if new events so required is sufficient to distinguish that case. *Id.* It is not sufficient, however. If the Eleventh Circuit's rule were correct, this Court could not have approved the consent decree in *Associated Press*, because the market power of the Associated Press was evident on the record before it. See 326 U.S. at 12-13. *Associated Press* does not stand only for the government's right to reopen enforce-

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membership on the Board of Realtors is available to the Popes on a non-discriminatory basis" and "whether board membership may be required for participation in the MLS under the antitrust laws." *Id.* at 266, 269. "The critical legal question is whether requiring board membership to participate in MLS satisfied the 'rule of reason' standard or is a violation of the antitrust laws." *Id.* at 269; *see id.* at 270 (same). Relying on *Associated Press*, the court held that "[a] private organization may limit its services to its members as long as there is no arbitrary exclusion from membership, even where the services are economically necessary." *Id.* at 269-70.

ment proceedings. It stands, as court after court has understood, for the proposition "that an organization may lawfully limit its services and facilities to its members." [2]

The Eleventh Circuit's remand for a *per se* tying analysis is inconsistent with this Court's decision in *Associated Press*. The Solicitor General not only concedes that *per se* tying analysis is "rarely applicable" to membership organizations, he devotes several pages of his brief to an analysis of the correct standard under Section 1 that nowhere involves tying analysis. U.S. Br. 7-11. The government's discussion underscores petitioners' basic point that it "makes no sense to say that a restraint which is lawful when challenged as a boycott under Section 1 suddenly becomes *per se* unlawful once it is labeled a 'tying arrangement.' " Pet. 23.[3]

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[2] *Pope*, 695 F. Supp. at 270. *See, e.g., Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119, 128 (8th Cir. 1973) (Court in *Associated Press* refused to strike down ban against providing service to nonmembers), *cert. denied*, 415 U.S. 918 (1974); *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 130 (Iowa 1981) (in *Associated Press* the "Court also . . . [held] that AP need not serve nonmember applicants to comply with antitrust laws"); *Murphy* v. *Alpha Realty, Inc.*, 1978-2 Trade Cases ¶ 62,388, p. 76,315 (N.D. Ill. 1978) (citing *Associated Press* for principle that "allows the Board to limit participation in the MLS to Board members"); *Martin-Trigona* v. *National Ass'n of Realtors*, 1978-1 Trade Cases ¶ 61,915, p. 73,873 (E.D. Ill. 1978) (same).

[3] As for *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988) (*see* U.S. Br. 17), petitioners acknowledged in their opening brief that the decision below conflicted only "with the reasoning" of the First Circuit. Pet. 19. Regardless of the rationale, the overriding point is that no court, until the decision below, has held that a local board—or any association for that matter—must defend its chosen package of membership benefits and services on the merits against a challenge of *per se* tying. The Solicitor General agrees that, under this Court's precedents, "per se tying analysis is rarely applicable" in these circumstances. U.S. Br. 15. There is simply no point in remanding for further factual development of a claim that, as a matter of law, is not viable.

In addition, the Eleventh Circuit's decision squarely conflicts with four district court and two state supreme court decisions. Pet. 15-16. The government argues only that this Court should discount the conflicts with the two state supreme court decisions because they rest on state law. U.S. Br. 13 n.7. But the government simply ignores petitioners' point (Pet. 16) that these state courts, like most state courts, rely heavily on Sherman Act precedent in construing their state antitrust laws which were "patterned after the Sherman Act" and are "to be construed in harmony" with that Act. *Pomanowski* v. *Monmouth County Bd. of Realtors*, 446 A.2d 83, 87, 91 (N.J.), *cert. denied*, 459 U.S. 908 (1982) (internal quotes and cites omitted); see *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 128 (Iowa 1981) (same). Moreover, it is undisputed and indisputable that, despite numerous opportunities, the Justice Department, like the federal courts, has never required a Board to abandon a cost-based and non-discriminatory Board membership requirement.[4] Yet, as discussed below, that effectively is the consequence of the Eleventh Circuit's decision.

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[4] In discussing the consent decrees, the government omits the fact that, in the case of the Oregon MLS, the MLS and the Board historically were separate entities with separate membership, and so there was no objection to a decree perpetuating that status. U.S. Br. 14. All other consent decrees, as the government necessarily concedes, expressly allowed Boards to maintain Board-membership requirements for MLS participation as long as the conditions of Board membership were "reasonable and nondiscriminatory"—precisely the standard enforced in *Pope* and that petitioners seek to vindicate here. *See id.*

For decrees allowing reasonable and nondiscriminatory board membership where the MLS was separately incorporated, *see United States* v. *Greater Syracuse Bd. of Realtors, Inc.*, 1980-81 Trade Cases ¶ 63,571, p. 77,039 ¶ VI (N.D.N.Y. 1980); *United States* v. *Real Estate Bd. of Rochester, Inc.*, 1974-2 Trade Cases ¶ 75,355, p. 98,129 ¶ V (W.D.N.Y. 1974); *United States* v. *Los Angeles Realty Bd.*, 1973-1 Trade Cases ¶ 74,366, p. 93,694 ¶ VI(A) (C.D. Cal. 1973). For comparable decrees where the MLS was not separately incorporated, *see United States* v. *Real Estate Bd. of Metro. St. Louis*, 1973-2 Trade Cases ¶ 74,744, p. 95,250 ¶ VI(A) (E.D. Mo. 1973); *United States* v. *Greater Pittsburgh Bd. of Realtors*, 1973-

These decisional conflicts, together with the Solicitor General's acknowledgement of the flaws in the decision below and its likely adverse national impact, are compelling reasons for this Court to hear this case.

2. Significantly, the Solicitor General does not argue that the interlocutory posture of the case is reason itself to deny certiorari, and for good reason—he acknowledges that the anticompetitive consequences of the ruling go beyond this case. U.S. Br. 7 & n.3. He suggests, however, that a remand is not inappropriate because "claims in this area should be resolved 'on a case-by-case basis, focusing on the particular facts disclosed by the record,' rather than on the basis of a per se rule." *Id.* at 10 (quoting *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, No. 90-1029, slip op. 13 (June 8, 1992)). This suggestion provides no basis for denying review in this case.

Petitioners agree that antitrust disputes should be resolved case-by-case. But that very process presupposes that a court has a proper standard to apply. Petitioners simply seek to have this Court resolve whether the Fifth Circuit in *Pope* or the Eleventh Circuit below correctly identified the controlling legal standard. All of the facts necessary to resolve this legal question are undisputed. Pet. 2-6 & n.1.

Moreover, the Solicitor General's discussion makes clear that the remand proceedings he envisions will require an expenditure of resources and time far in excess of what most associations can afford in order to defend their membership rules against antitrust challenges. Petitioners do not deny that they could go back to district court, retain expert witnesses, reinvent *The Logic of Collective Action*, define relevant markets, assess barriers to entry,

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1 Trade Cases ¶ 74,454, p. 94,037 ¶ VI(A) (W.D. Pa. 1973); *United States* v. *Memphis Bd. of Realtors*, 1972 Trade Cases ¶ 74,056, p. 92,374 ¶ VI(A) (W.D. Tenn. 1972). Copies of these decrees have been lodged with the Clerk.

and litigate the existence of separate product markets and numerous other subissues on tying that occupy so many pages in Professor Areeda's treatise.[5] But few, if any, local Boards or other associations will have the resources to engage in such expensive, time-consuming antitrust litigation in order to defend their membership rules. Under the government's approach, disgruntled individuals and groups who seek to pick and choose among an association's services will achieve by threat of attrition what the government admits they ought not be able to obtain by law.

The antitrust laws do not require this result. The Solicitor General acknowledges that "[p]roperly applied, the antitrust laws seldom should prevent a trade association from deciding for itself on the particular package of services and benefits it wishes to extend to members." U.S. Br. 10. He also admits that making services available to non-members will have substantial anticompetitive effects. "[I]f an assocation were required to make every service or benefit it provided available to non-members, there might be no members, no association, and thus none of the procompetitive benefits the association offers." U.S. Br. 8. At a minimum, the incentive for associations to develop new services, and the ability of associations to attract new members and accumulate the means necessary to develop and provide competitively valuable and comprehensive services, will be seriously undercut. See

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[5] On the boycott claim, the government, citing Mancur Olson's 1965 book *The Logic of Collective Action*, encourages petitioners to go back to the district court and develop new arguments about the "need to discourage free-riding" and about the ways in which the Board-membership requirement makes it "significantly more efficient to administer and enforce the no-solicitation and arbitration rules." U.S. Br. 8, 19-20. Similarly, on the tying claim, the government argues that, notwithstanding the court of appeals' holding that *per se* tying analysis controlled, petitioners should develop arguments based on Professor Areeda's three-hundred page treatise on tying about the reasons why "per se analysis does not apply . . . ." *Id.* at 15 (citing IX P. Areeda, *Antitrust Law* ¶ 1724(a), at 308-11 (1991)).

Brief of the American Society of Association Executives, *et al.*, as *Amicus Curiae* in Support of Petitioners 6-7, 11-12.

At the same time, no one—neither the court below, the respondents, nor the government—has been able to identify any anticompetitive effects flowing from an association's decision to enforce reasonable and nondiscriminatory membership rules. The most the government can say is that a "cost-based" membership fee might nevertheless be "unreasonable" if the fee included "services only remotely or tangentially related to members' professional activities." U.S. Br. 10. But that concern (which respondents have not raised) is just a refinement of petitioners' point that courts should focus on whether membership requirements are reasonable and nondiscriminatory. It provides no basis for remanding for extended proceedings on market power, the existence of a separate market for membership status apart from membership services, and other *per se* tying issues.

Petitioners' fundamental point is that reasonable and nondiscriminatory membership requirements do not exclude anybody because, by definition, all individuals are eligible to join the association and obtain the services on the same reasonable terms as everyone else. Enforcing such terms cannot be anticompetitive, because no one is unfairly excluded from obtaining services and the price of services is by definition cost-based. The focus of any antitrust challenge to membership requirements therefore should be—as it was in *Pope*—whether those requirements are truly reasonable and non-discriminatory, and not whether the association has market power, whether separate markets exist, etc. There is thus no need for a remand for this Court to resolve the question presented here. *Cf. FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986).[6] A remand will lead either

[6] In *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), this Court held that where plaintiff could demonstrate that defendants' conduct had actual anticompetitive effects, it was error for

to an unwarranted victory by default for respondents or to a waste of judicial and private resources.

If this Court denies certiorari, the result will be precisely what the government predicts: The Eleventh Circuit's decision will "encourage (or prolong) unwarranted antitrust challenges to association membership requirements." *Id.* at 7 & n.3. These negative effects already are evident. The government acknowledges the disruption in the Eleventh Circuit alone, where over 100 Boards of Realtors currently are investing thousands of person-hours in the laborious, resource-intensive process of reviewing and revising their by-laws and membership requirements. *Id.* Petitioners are informed by *amicus* National Association of Realtors that one local board within the Eleventh Circuit has already chosen to admit a non-Board-member into its MLS, even though this individual had previously been expelled from the Board for repeated violations of Board rules. The cost of litigation under the Eleventh Circuit's standards was deemed too great to make enforcement of the Board's membership requirement worthwhile.

Outside the Eleventh Circuit, one Board already faces an antitrust suit filed in the wake of the decision below by a former member seeking MLS access. Other boards have been notified of the prospect of litigation if suitable accommodation of non-members is not obtained. (Copies of correspondence with the Solicitor General discussing this fall-out have been lodged with the Clerk). The prob-

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the court of appeals to remand for an analysis of market definition and market power. *Id.* at 460-61. Here, the converse is true. A remand for such market analysis seems equally inappropriate where, as here, it is evident that no anticompetitive effects can flow from defendants' maintenance of reasonable and nondiscriminatory membership requirements.

It is also worth noting that the Solicitor General declined to file a petition for certiorari on behalf of the FTC in the *Indiana Federation* case. The Commission was forced to rely on its independent litigating authority in order to seek reversal of the Seventh Circuit's inappropriate insistence on developing more facts. *See* Pet. 1 n.1, in *FTC* v. *Indiana Fed'n of Dentists*, No. 84-1809 (filed May 17, 1985).

lem of this decision "encourag[ing] (or prolong[ing]) unwarranted antitrust challenges to association membership requirements" (*id.* at 7) is thus a real one. After nearly two decades of consistent application of the *Associated Press* rule by courts and the Department of Justice alike, the anticompetitive litigation generated by the decision below is wholly unacceptable.

3. In sum, the Eleventh Circuit's decision simply cannot be reconciled with the decisions of this Court, other federal and state courts, and the practice of the Justice Department. No court has required local Boards to develop complicated data on market power, expert testimony on cost efficiencies and free-rider theory, separate markets analysis, and more, every time a disgruntled individual wants to get access to the multilist without joining the Board. Petitioners submit that a careful analysis of the relevant cases and antitrust principles will persuade this Court to grant review.

CONCLUSION

For these reasons and those stated in the petition and the reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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